No. 91-1916

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

WESTERN SHOSHONE NATIONAL COUNCIL, in its own behalf and in behalf of Western Shoshone Tribal Governments; IAN ZABARTE, FELIX IKE,

Petitioners,

v.

WILLIAM MOLINI, Director, Nevada Department of Wildlife; TERRY CRAWFORTH, Director of Law Enforcement, Nevada Department of Wildlife,

Respondents.

Petition For A Writ of Certiorari To the United States Court Of Appeals For the Ninth Circuit

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Petitioners' Reply to Opposition to Petition For A Writ of Certiorari

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WILLIAM MOLINI, Director, Nevada Department of Wildlife; TERRY CRAWFORTH, Director of Law Enforcement, Nevada Department of Wildlife,

Respondents.

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I. The Respondents Misrepresent Prior Authority by This Court and Other Federal Courts.

A. The only ground upon which the Ninth Circuit in this case denied Western Shoshone hunting and fishing rights was the award of the Indian Claims Commission (sometimes hereinafter "ICC") in Docket 326-K, an award for the taking of Western Shoshone title. The Respondents attempt to mask the novelty of the lower court's decision by insisting that this Court in *United States v. Dann*, 470 U.S. 39, 105 S.Ct. 1058 (1985), held "that Western Shoshone title is extinguished." Respondents' Opposition to Petition at 11. The Respondents misrepresent this Court's ruling in *United States v. Dann*.

This Court in *Dann* held only that "payment" occurred within the meaning of the statutory bar of the Indian Claims Commission Act, Section 22(a) of the Act, when funds were placed into a United States Treasury account pursuant to the Commission award in Docket 326-K. Nowhere in the decision in *Dann* did the Court state that the ICC award extinguished Western Shoshone rights. This Court's entire opinion in *Dann* was devoted to interpreting Section 22(a) the Act, whereas the Respondents make no mention whatsoever of Section 22(a). The Respondents persist in confusing an act of extinguishment of Indian rights with the procedural bar of Section 22(a).

Until the Ninth Circuit's decision herein, no federal court had held that an ICC award itself extinguishes Indian rights. The Ninth Circuit's decision overreaches the Supreme Court's holding in *United States v. Dann* and is contrary to the Ninth Circuit's prior holding in *Dann* on remand: "The Claims award could not itself extinguish" Indian rights. *United States v. Dann* 873 F.2d 1189, 1198 (9th Cir. 1989) *cert. denied*, 110 S. Ct. 234. The Ninth Circuit now stands in conflict with other circuits. *See, e.g., Devils Lake Sioux Tribe v. State of North Dakota*, 917 F.2d 1049, 1051 (8th Cir. 1990) (Commission's jurisdiction limited to granting monetary compensation for claims arising on or before August 13, 1946; the Commission was not empowered to grant declaratory or injunctive relief); *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1469 (10th Cir. 1987) (Indian Claims Commission Act did not provide for the extinguishment of Indian rights but rather provided the opportunity for Indians to be recompensed for government actions inconsistent with those rights).

B. Building upon the premise that the Commission award in Docket 326-K resulted in the actual extinguishment of Western Shoshone land title, the Respondents assert that the Ninth Circuit was well within established precedent when it found that Western Shoshone hunting and fishing rights also were extinguished. According to the Respondents, the court of appeals was

correct not to examine relevant treaty provisions or historical understanding to assess the scope of the presumed extinguishment. Extinguishment of title by an Indian Claims Commission award, say the Respondents, *necessarily* includes an extinguishment of hunting and fishing rights, regardless of any treaty terms or other relevant acts. Respondents' Opposition to Petition at 15, 17.

The Respondents' defense of the Ninth Circuit's decision emphasizes the conflict with other circuits. In *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 362 (7th Cir. 1983), *cert. denied*, 464 U.S. 805 (1983), the Seventh Circuit rejected the contention that "usufructuary rights are *always* tied to occupancy" (emphasis original). The court stated, "Such a conclusion would clearly be inconsistent with precedent ..." *Id.* at 362-63 (citing *United States v. Winans*, 198 U.S. 371 (1905)). In *Lac Courte Oreille* the Seventh Circuit closely examined the relevant history and held that a 1954 treaty did not extinguish hunting and fishing rights reserved under earlier treaties, even assuming that the 1954 treaty extinguished coterminous occupancy rights, *id.* at 362, n. 12, and despite the absence of explicit language in the 1854 treaty confirming the continuation of hunting and fishing rights, *id.* at 362-65.

Similarly, in *United States v. Michigan*, 653 F.2d 277, 278 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1988) the Sixth Circuit affirmed that the Sault Ste. Marie Chippewa have continuing treaty-reserved rights to fish in areas of the Great Lakes, rights that exist independently of title to land. The district court had found, in a voluminous opinion exploring the historical context, that an 1836 treaty impliedly reserved the Indians' right to fish along with the express right under article thirteen of the treaty to continue the "usual privileges of occupancy" on aboriginal land until the "land is required for settlement". *United States v. Michigan*, 471 F.Supp. 192, 253-58 (W.D. Mich. 1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124 (1988). Although the district court acknowledged that settlement patterns would extinguish Indian rights to

lands adjacent to the Great Lakes pursuant to article thirteen, the court found that the implied treaty-reserved fishing rights survived because the Lakes have not been required for settlement. *Id.* at 259.

See also Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 823 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1983) (hunting and fishing rights on Indian lands were not extinguished when the lands were taken for flood control projects "since [the Indians] could still exercise those rights"); *United States v Minnesota*, 466 F.Supp. 1382, 1386 (D. Minn. 1979), *aff'd per curiam sub. nom., Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied*, 449 U.S. 905 (1980) (finding usufructuary rights gone with title but only after "examin[ing] the prior history, surrounding circumstances and subsequent construction by the parties to determine whether there was an understanding, not reduced to writing, that the band members could continue permanently to hunt, fish, trap and gather wild rice in the ceded areas").

The Respondents brush aside *Lac Courte Oreille*, *United States v. Michigan* and *Lower Brule Sioux Tribe* by simply stating that those cases did not involve an Indian Claims Commission award. Respondents' Opposition to Petition at 18. Apparently, the Respondents are telling the Court that an ICC award is not only capable of extinguishing Indian rights, but its sweep is broader than that of acts previously established as capable of extinguishing Indian rights.

The Respondents repeat the Ninth Circuit's mischaracterization of *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985). In *Klamath*, this Court affirmed that Indian hunting and fishing rights may survive an extinguishment of title:

> We agree ... that Indians may enjoy special hunting and fishing rights that are independent of any ownership of land, and that ... such rights may survive the termination of [land title]. Moreover, the Court of Appeals was entirely correct in its view that doubts concerning the

> meaning of a treaty with an Indian tribe should be resolved in favor of the tribe.

Id. at 765-66 (footnotes omitted).

The Respondents ignore the import of *Klamath* and hold out as settled the ground-breaking proposition that "without exception, hunting and fishing rights go with title as incidents of title." Respondents' Opposition to Petition at 17.[1] The Respondents have failed to regard precedent accurately, and they have failed to conceal the doctrinal novelty and incoherence that the lower court's decision represents.

C. Throughout this litigation the Western Shoshone have argued that longstanding canons of treaty interpretation lead to the conclusion that the Treaty of Ruby Valley, 18 Stat. 689 (1896) (App. D to Petition) reserved Western Shoshone hunting and fishing rights and that the rights could survive the extinguishment of title by "gradual encroachment" which the Indian Claims Commission found to have occurred. *See* Petition for Writ of Certiorari at 13-19.

The Respondents do not dispute that the court of appeals failed to examine closely the Treaty of Ruby Valley according to the canons of treaty interpretation upheld by over a century of federal court decisions. Rather the Respondents submit that interpretation of the Treaty of Ruby Valley is precluded or obviated because the Treaty was pled in the claim before the ICC. Respondents' Opposition to Petition at 13-15. The Respondents point out that the petition to the Indian Claims Commission pled in the alternative that, "in violation of the rights or title of

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[1]The Respondents rely primarily on a mischaracterization of *In re Wilson*, 634 P.2d 363 (Cal. 1981). In that case the California court found that aboriginal hunting and fishing rights of the Pit River Tribe were taken unambiguously along with title by a series of federal acts including forcible removal and military conquest of the Indians, a series of acts that has no parallel here. *Id.* at 370-371.

ownership or occupancy recognized ... by the Treaty of Ruby Valley, [the United States] has disposed of a large part of [Western Shoshone] land ..." Quoted in *Western Shoshone Identifiable Group v. United States*, 35 Ind. Cl. Comm. 457, 461 (1975).

The petition did not specify a taking of hunting or fishing rights, the Commission did not specifically adjudicate hunting or fishing rights, and the claims attorneys represented to the Western Shoshone that hunting and fishing rights were not implicated in the claim, Letter to Clarence Blossom from Attorney Robert Barker of Jan. 13, 1960 (App. E to Petition at 23a). Yet, according to the Respondents, none of this matters.

The Respondents effectively hold that when a treaty has been pled in a petition before the ICC, *all* rights that might exist under the treaty are presumed included in the pleading, regardless of the language of the petition or the terms of the treaty; and all the treaty rights are extinguished by an ICC award pursuant to the pleading, regardless of what was actually adjudicated in the ICC proceeding. Respondents' Opposition to Petition at 13-15. No reasoning or authority is given for such a far-reaching proposition, other than the lower court decision.

Furthermore, the rule upends the longstanding principle of federal law that acts of extinguishment of Indian rights are to be accorded their narrowest possible construction, *United States ex. rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339, 353, 347 (1941), is contrary to generally accepted rules of claim preclusion, *see Carpenter v. United States*, 108 F.Supp. 107 (Ct. Cl. 1952), and specifically conflicts with the Eighth Circuit's decision in *Devils Lake Sioux Tribe v. North Dakota*, 917 F.2d 1049, 1051 (8th Cir. 1990) (an ICC claim and award for the taking of Indian lands did not include, and hence did not preclude in a subsequent action, a claim for an adjacent lakebed, even though the petition in the ICC "may have contained an implicit reference to the lakebed"). The Respondents' rule fails as a defense of the Ninth Circuits'

aberrant method of interpreting the Treaty of Ruby Valley to find an absence treaty rights.[2]

D. The Western Shoshone have urged adherence to the express language of the Indian Claims Commission Act which bars future claims only "against the *United States*." Section 22 of the Act, 25 U.S.C. 70u (1976 ed.) (emphasis supplied). The Respondents argue that the Western Shoshone thereby "seek to create new precedent." Respondents' Opposition to Petition at 19.

The only previously reported federal court decision to have squarely confronted the issue is *Cayuga Indian Nation v. Cuomo*, 667 F.Supp. 938 (N.D.N.Y. 1987). In that case the court declined to find a tribal claim against New York officials precluded by the statutory bar of the ICCA. The court said in clear terms that the statutory bar "applies only to claims against the United States." *Id.* at 947, n. 2. The

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[2]Apparently acknowledging this failure, the Respondents refer in a footnote to *dicta* in the plurality opinion in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 348 (1945), concerning the issue of recognized land title under the Shoshone treaties.

Whatever *Northwestern Bands* may have to say about evidence concerning the understanding of the United States or the Indians concerning the recognition of full title under the Treaty of Ruby Valley, there is ample evidence that the parties intended and understood the Treaty to reserve hunting and fishing rights. For example, the United States' intentions are summarized in U.S. treaty Commissioner James Doty's letter of reply to his superior's instructions to treat with the Shoshones:

> I therefore hasten to meet them, that *some arrangement may be made by which they can with satisfaction return to their hunting grounds*, and upon terms which shall secure peace hereafter, safety to the emigrants and travelers and relieve the department of the expense [of feeding them] now being incurred.

Letter from James Doty, Superintendent of Indian Affairs of June 20, 1863, (reprinted in 1863 Report of the Commissioner of Indian Affairs)(emphasis supplied). Additional evidence is synthesized in Brief of Plaintiffs-Appellants to the Ninth Circuit in the proceedings below at 5-8, 33-40.

court also found that the tribal claim against New York defendants was not barred under common law preclusion given the requirement of mutuality of parties. *Id.* at 947. The court observed that, as in the present case, "none of the defendants in this [federal] court action, nor their privies, were defendants in the ICC action." *Id.*

While acting as if *Cayuga* said nothing of this sort, the Respondents attempt to distinguish the case by pointing out that it concerned a claim for lands taken by the state pursuant to a treaty directly with the Indians. The distinction is immaterial. Although Nevada has not treated directly with the Western Shoshone to take lands from them, it has impeded the enjoyment of Western Shoshone hunting and fishing rights, and it is that impediment that is the basis of the present lawsuit.

II. The Respondents Misrepresent the Factual Record.

A. The Respondents accuse the Western Shoshone Petitioners of "inconsistencies" in the evidence proffered to support the position that the Western Shoshone have continuously hunted and fished pursuant to the understanding that their right to do so was secured under the Treaty of Ruby Valley. Respondents' Opposition to Petition at 24. To prop up the accusation, the Respondents misrepresent testimony from a 1932 hearing of a Senate sub-committee on Indian affairs, quoted by the Western Shoshone in their brief to the court of appeals. The sub-committee heard from Temoak, a Western Shoshone Indian and grandson of the principle signatory of the Treaty of Ruby Valley. When asked by a Senator whether the Indians continued to hunt, Temoak said, "Yes; that is what they live on." *Survey of Conditions of the Indians in the United States*, Hearings before a Sub-Committee of Indian Affairs, U.S. Senate, 72nd Cong., 1st Sess., part 28, pages 14,819-20 (as quoted in Appellants' Brief at 38, n.13). At most, the respondents bring into question facts concerning the construction of the Treaty of Ruby Valley, highlighting the inappropriateness of the court of appeals' affirmation of

summary judgment against the Western Shoshone. *Cf. Lac Courte Oreilles*, 700 F.2d at 349 (facts concerning interpretation of treaty are to be construed in favor of Indian parties in considering summary judgment motion against them).

B. Also, the Respondents mislead the Court in suggesting that in the proceedings below they indicated "much evidence that hunting and fishing rights were precisely the rights compensated by the [ICC] award." Respondents' Opposition to Petition at 25. The Respondents have proffered no such evidence, only speculative argument.

C. The Respondents attempt to shift the equities against the Western Shoshone by suggesting that Congress has dealt fully with Western Shoshone claims--including hunting and fishing rights claims--and by implying that only a dissident minority of the Western Shoshone hold to the belief that Western Shoshone hunting and fishing rights survive. The Respondents suggest that Congress is on the verge of enacting legislation that would distribute to the Western Shoshone the Indian Claims Commission award which has remained in a trust account since it was certified in 1979. Respondents' Opposition to Petition at 7 (citing H.R. 3897, 102d Cong., 1st Sess. (1991)). In fact, the legislative effort has foundered in the face of widespread opposition to distributing the award while Western Shoshone claims are outstanding. *See* Letter of George Miller, Chairman, U.S. House of Reps. Comm. on Interior and Insular Affairs, to Rep. Barbara F. Vucanovich of June 19, 1992 (stating that the House Committee will not consider H.R. 3897).

The Respondents point to a statement signed by only two individuals who deny continuing Western Shoshone hunting and fishing rights but who in the same statement assert that they are not beneficiaries of the Treaty of Ruby Valley. Affidavit of Darlene Murphy and John B. Darrough, attached to defendants' "Opposition to Motion for Summary

Judgment, Supplemental Affidavits and Documents," filed April 6, 1988. The Respondents ignore the numerous Western Shoshones, numbering in excess of one thousand, who submitted to the jurisdiction of the Petitioner Western Shoshone National Council for the exercise of hunting and fishing rights pursuant to the preliminary injunction in this case.

Senator Inouye, Chairman of the Senate Select Committee on Indian Affairs, has identified a "growing consensus among leaders of the Shoshone tribal governments and other interested parties" with a view toward alternatives to the proposed legislation that would have distributed the ICC award. Letter from Daniel K. Inouye, Chairman, Senate Select Committee on Indian Affairs, to Tim Glidden, Counselor to the Secretary of Interior, of June 22, 1992. The overriding sentiment of the Western Shoshone can be gauged by the widespread opposition voiced by Western Shoshone leaders in congressional hearings to the proposed legislation, and it is evident that Western Shoshone leaders have created broad awareness about the lack of basic fairness in the ICC proceedings.

Respectfully submitted,

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